

LESSONS FROM THE SANTA YSABEL TRIBE'S BET ON INTERNET BINGO

The State of California's litigation over the Santa Ysabel Tribe's DesertRoseBingo.com website presents a case of first impression with respect to a tribe's right to conduct Class II Internet gaming pursuant to IGRA, as well as the effect of the Internet on a game's status as Class II or Class III, write **Heidi McNeil Staudenmaier** and **Anthony J. Carucci** of Snell & Wilmer LLP.

As the US Indian gaming market approaches \$30 billion in annual revenue,¹ Indian tribes have begun looking to the Internet to expand their gaming operations. While Indian tribes throughout the United States have offered gambling in brick-and-mortar establishments pursuant to the Indian Gaming Regulatory Act ("IGRA")² since its passage in 1988, it is only in the last few years that tribes have contemplated offering Internet gaming.

The Department of Justice ("DOJ") appears to have backed away from its long-standing position that any gaming through the Internet constitutes a violation of the Federal Wire Act.³ A DOJ memorandum opinion issued in 2011 concluded that interstate transmissions of wire communications that do not relate to a "sporting event or contest" fall outside the Federal Wire Act's purview.

The DOJ's somewhat relaxed view appears to give states the go-ahead to legislate with respect to non-sports related Internet gaming, and has sparked interest among tribes and their business partners in entering the Internet gaming market. Nevertheless, in the absence of specific legislation or a tribal-state compact authorizing online gaming, there remains no clear law as to whether an Indian tribe can offer Class II games through the Internet pursuant to IGRA.

The diffusion of regulatory authority under IGRA

In enacting IGRA, Congress found that: "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically

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prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity."⁴ To implement this policy, IGRA created three categories of gaming to diffuse regulatory authority between the Federal government, the States, and the tribes. IGRA's classification system is now at the

heart of the dispute over the legality of tribes offering Internet gaming.⁵

Class II gaming under IGRA includes bingo and non-banked card games.⁶ Class II games may use electronic and technological aids; however, if the technology is deemed an "electronic or electromechanical facsimile," then the game is elevated to Class III status.⁷

Class III gaming is defined simply as "all forms of gaming that are not Class I gaming or Class II gaming," and includes house games, like blackjack and baccarat, as well as machine-

based games, like video poker and slots.⁸

IGRA permits tribes to conduct Class II gaming within the tribe's jurisdiction, but subject to IGRA's provisions, including oversight by the National Indian Gaming Commission ("NIGC") — a federal agency.⁹ Specifically, tribes may conduct Class II gaming within the tribe's jurisdiction — and

¹ NATIONAL INDIAN GAMING COMMISSION, Gaming Revenues 2010–2014, available at <http://www.nigc.gov/Portals/0/NIGC%20Uploads/media/teleconference/2014%20Tribal%20Gaming%20Revenues%20by%20Gaming%20Operation%20Revenue%20Range.pdf> (reporting revenue of approximately \$28.46 billion in 2014, up from \$28.03 billion in 2013).

² 25 U.S.C. § 2701 et seq.

³ 18 U.S.C. § 1084.

⁴ 25 U.S.C. § 2701(5).

⁵ See generally id. §§ 2703, 2710.

⁶ Id. § 2703(7)(A).

⁷ Id. § 2703(7)(B)(ii).

⁸ Id. § 2703(8).

⁹ Id. § 2710(a)(2).

“Regardless of the game’s classification, however, the State will likely be entitled to a permanent injunction if the court finds the bet is initiated where the player is located, notwithstanding the Tribe’s proxy technology.”

free from state interference — if the gaming is conducted (1) on Indian lands; (2) in a state that permits such gaming for any purpose; (3) the gaming is not otherwise specifically prohibited on Indian lands by federal law; and (4) the governing body of the tribe adopts an ordinance or resolution approved by the chairman of the NIGC.¹⁰

By contrast, Class III gaming can only be conducted by a tribe pursuant to a tribal-state compact entered into by the tribe and the state. The compact must be approved by the Secretary of the Interior and published in the Federal Register.¹¹

The Santa Ysabel Tribe’s bet on Internet bingo

A colorable argument can — and has — been made that tribes already have the authority to offer Internet gaming under their Class II

authority. The Iipay Nation of Santa Ysabel Indian Tribe of California (the “Tribe”) boldly sought to enter the online gaming market when it launched an Internet bingo website (DesertRoseBingo.com) in November 2014. The State of California (the “State”) promptly filed suit to shut down the Tribe’s website. On December 12, 2014, the State successfully obtained a temporary restraining order (“TRO”) enjoining the Tribe from offering any gambling over the Internet to persons not physically located on the Tribe’s Indian lands and from accepting any funds from persons wagering over the Internet.¹²

The litigation presents a case of first impression with respect to a tribe’s right to conduct Class II Internet gaming pursuant to IGRA and the effect of the Internet on a game’s status as Class II or Class III gaming. IGRA’s classification system is at the heart

of the dispute between the Tribe and the State. The game’s classification determines whether the Tribe is engaged in permissible Class II gaming subject only to tribal regulation and NIGC oversight, or Class III gaming in violation of its tribal-state compact.

The crux of the litigation is whether IGRA’s requirement that Class II gaming occur “on Indian lands” means the player must be physically located on the tribe’s reservation, or whether “electronic, computer, or other technologic aids” encompasses technology enabling people to gamble “on Indian lands” while physically located elsewhere.

The State advanced two broad arguments in obtaining its TRO. First, the State argued the Tribe’s Internet bingo website violates both its tribal-state compact and the Unlawful Internet Gaming Enforcement Act (“UIGEA”)¹³ because it facilitates off-reservation gaming. The State argued the gaming takes place off-reservation because wagering occurs both where the wager is placed and where it is received, and that the UIGEA looks to the laws of the place both where the wager is placed and where it is received. Regardless of whether the Tribe’s online bingo game is considered a Class II game, the State may obtain a permanent injunction if the court finds that any gaming occurs off-reservation, where the actual player is located.

Second, the State argued the Tribe’s online bingo game constitutes a facsimile of the underlying game, elevating the game from Class II to Class III. The State’s argument

¹⁰ Id. § 2710(b)(1).

¹¹ Id. § 2710(d)(1)(C).

¹² The United States also filed a similar suit on December 3, 2014, which was consolidated with the State’s case on August 31, 2015. The federal lawsuit seeks a permanent injunction under the Unlawful Internet Gaming Enforcement Act. At the time this article was prepared, there had been no substantive activity in the federal lawsuit. The parties have stipulated that a trial on the merits will be consolidated with the hearing on the State’s preliminary injunction, currently set for February 9, 2016.

¹³ The UIGEA is a federal statute that makes it unlawful for a person engaged in the business of betting or wagering to knowingly accept a financial instrument or the proceeds thereof from a person engaged in “unlawful Internet gambling,” which is defined to mean “to place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made.” 31 U.S.C. §§ 5363, 5362(10)(A).

is grounded in the NIGC's view that if "a particular aid . . . becomes a necessity, or encompasses all the aspects of a particular game, it ceases to be a technological aid and becomes an electronic facsimile."¹⁴ According to the State, the Tribe's game is an electronic facsimile because the electronic system is a necessity, as the game would disappear if the electronic system were removed.

At the TRO stage, the Tribe opposed both of the State's arguments on the basis that its game constitutes a "technologic aid," employing "proxy technology" that allows off-reservation players to place wagers exclusively on tribal lands. In support, the Tribe cited a 2014 NIGC Advisory Opinion, which found that, from a legal perspective, the proxy is the player.¹⁵ The Tribe also argued the game is not a facsimile because the technologic aid employed by the Tribe increases participation among players, rather than facilitating individual play against the "house."

In granting the TRO, the court found the game constitutes an electronic facsimile, and distinguished the NIGC Advisory Opinion relied on by the Tribe.¹⁶ The court further found the UIGEA looks to the law both whether the bet is made and where the wager is received, and that the Tribe's game violates state law by accepting bets initiated off-reservation.¹⁷

There seems to be tension in the sources construing IGRA's requirements for

"electronic, computer, or other technologic aids" between the aid incorporating all of the characteristics of the game into an electronic format and the aid increasing participation among players. The Internet arguably fits Congress's description of a technologic aid as something aimed at enabling broader participation. At the same time, the Tribe's online bingo game incorporates all the characteristics of the game into an electronic format, which the NIGC and some courts have interpreted as the benchmark for identifying a facsimile under IGRA.¹⁸ This tension may prove dispositive in the Tribe's pursuit to operate an online bingo website. Regardless of the game's classification, however, the State will likely be entitled to a permanent injunction if the court finds the bet is initiated where the player is located, notwithstanding the Tribe's proxy technology.

California iPoker legislation and the Santa Ysabel

Efforts by the California legislature to legalize some form of Internet poker further complicate issues for the Tribe. Although dead for 2015, bills to legalize Internet poker in California have been introduced each year since 2008.

While it is unclear what effect iPoker legislation may have on other tribal efforts to operate online bingo, any iPoker

legislation including a "bad actor" clause could prohibit Santa Ysabel from entering the California iPoker market.

The two main impediments preventing consensus on iPoker legislation in California to date are (1) bad actor provisions; and (2) the inclusion of thoroughbred horse racing facilities. These issues have thwarted consensus by polarizing several important groups of stakeholders. A coalition of tribes and several card clubs have partnered with Amaya, which purchased PokerStars in 2014, and oppose the inclusion of bad actor provisions. Other tribes seek the inclusion of bad actor provisions to prevent PokerStars's participation in the California online poker market. At odds with these coalitions stand the race tracks, which thus far have fought for licensing rights as opposed to a revenue sharing system.

With iPoker legislation in California facing potentially intractable challenges, and the Santa Ysabel Tribe facing an uphill battle to establish its right to operate an online bingo website, the future of tribal iGaming remains uncertain. Notwithstanding, the gaming industry is sure to keep a close eye on California in 2016.

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¹⁴ Mem. from Penny Coleman, General Counsel, NIGC, to George Skibine, Chairman, NIGC, re: Classification of card games played with technological aids, 8 (Dec. 17, 2009).

¹⁵ NATIONAL INDIAN GAMING COMMISSION ADVISORY OPINION, Bingo Nation, at 5 (June 27, 2014), available at <http://www.nigc.gov/LinkClick.aspx?fileticket=g3tqw7N3jH0%3D&tabid=789> ("When the proxy plays the bingo card for the player in Bingo Nation, the act of playing the card is deemed to be the act of the player. The legal effect is that the proxy is the player.")

¹⁶ NATIONAL INDIAN GAMING COMMISSION ADVISORY OPINION, Bingo Nation, at 5 (June 27, 2014), available at <http://www.nigc.gov/LinkClick.aspx?fileticket=g3tqw7N3jH0%3D&tabid=789> ("When the proxy plays the bingo card for the player in Bingo Nation, the act of playing the card is deemed to be the act of the player. The legal effect is that the proxy is the player.")

Order Granting Motion for Temporary Restraining Order and Order to Show Cause, at 10-12, *California v. Iipay Nation of Santa Ysabel*, No. 14-cv-2724-AJB-NLS (Dec. 12, 2014).

¹⁷ *Id.* at 13.

¹⁸ For a more detailed discussion, see Heidi McNeil Staudenmaier & Anthony J. Carucci, *The Santa Ysabel Tribe's Bet on Internet Bingo May Determine the Future of Class II Internet Gaming*, 19 GAMING L. REV. & ECON. 139 (2013).

¹⁹ A typical "bad actor" clause in iPoker bills prohibits any entity from obtaining a license to operate online poker if the company has accepted a bet or engaged in a financial transaction related to a bet after December 31, 2006, the enactment date of the UIGEA.